

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BANK OF AMERICA, N.A.,

Case No. 2:18-CV-880 JCM (PAL)

Plaintiff(s),

ORDER

V.

NEVADA TRAILS II COMMUNITY
ASSOCIATION, et al.,

Defendant(s).

Presently before this court is defendant/counter-claimant Daisy Trust's motion for summary judgment. (ECF No. 32). Plaintiff/counter-defendant Bank of America, N.A. ("BANA") filed a response (ECF No. 38), to which Daisy Trust replied (ECF No. 44).

Also before this court is defendant Nevada Trails II Community Association, Inc.’s (the “HOA”) motion to dismiss or in the alternative motion for summary judgment. (ECF No. 34). BANA filed a response (ECF No. 36), to which the HOA replied (ECF No. 42).

Also before the court is BANA's motion for summary judgment. (ECF No. 35). Daisy Trust filed a response (ECF No. 37), to which BANA replied (ECF No. 43).

I. Facts

This case involves a dispute over real property located at 7623 Cascade Ridge Court, Las Vegas, Nevada 89113 (the “property”).¹ (ECF No. 1 at 2). On July 29, 2008, Sung Chang obtained a loan in the amount of \$267,600.00 from BANA to purchase the property, which was secured by a deed of trust recorded on July 30, 2008. (ECF No. 1 at 3–4).

¹ BANA's motion for summary judgment (ECF No. 35 at 2) incorrectly refers to the property as "7623 Nevada Trails Ridge."

1 On September 1, 2009, defendant Alessi & Koenig, LLC (“A&K”), acting on behalf of the
2 HOA, recorded a notice of delinquent assessment lien, stating an amount due of \$632.00. (ECF
3 No.1 at 4). On December 7, 2009, A&K recorded a notice of default and election to sell to satisfy
4 the delinquent assessment lien, stating an amount due of \$1,630.00. (ECF No. 1 at 4).

5 On January 15, 2010, BANA requested a ledger from A&K to identify the superpriority
6 amount allegedly owed to the HOA. (ECF No. 35-4 at 6–7). A&K did not identify the super-
7 priority portion of the lien but reasserted a total amount due of \$2,624.00. (ECF No. 35-4 at 11–
8 14). BANA calculated the superpriority amount to be \$387.00 and tendered that amount to A&K
9 on April 30, 2010, which A&K allegedly refused. (ECF No. 35-4. at 16–18).

10 On August 9, 2010, A&K recorded a notice of trustee’s sale, stating an amount due of
11 \$2,763.00. (ECF No. 1 at 4). On November 18, 2011, A&K recorded a second notice of trustee’s
12 sale, stating an amount due of \$4,173.00. (ECF No. 1 at 4). On August 2, 2012, A&K recorded a
13 third notice of trustee’s sale, stating an amount due of \$4,398.00. (ECF No. 1 at 5).

14 On September 5, 2012, Daisy Trust purchased the property at the foreclosure sale for
15 \$6,300.00. (ECF No. 1 at 6). A foreclosure deed in favor of Daisy Trust was recorded on
16 September 11, 2012. (ECF No. 1 at 6).

17 On April 18, 2016, BANA filed the underlying complaint, alleging four causes of action:
18 (1) quiet title/declaratory judgment against all defendants; (2) breach of NRS 116.1113 against the
19 HOA and A&K; (3) wrongful foreclosure against the HOA and A&K; and (4) injunctive relief
20 against Daisy Trust. (ECF No. 1).

21 On May 10, 2016, Daisy Trust filed a counterclaim against BANA seeking quiet title and
22 declaratory relief. (ECF No. 11)

23 On May 5, 2017, Daisy Trust filed a motion for summary judgment regarding the two
24 claims in its counterclaim. (ECF No. 32).

25 Also, on May 5, 2017, the HOA filed a motion to dismiss or in the alternative motion for
26 summary judgment regarding all claims filed against it and argues that BANA failed to bring its
27 claims within the “applicable three year statute of limitations.” (ECF No. 34 at 2).

28

1 Lastly, on May 5, 2017, BANA filed a motion for summary judgment regarding the four
2 causes of action in its complaint. (ECF No. 35).

3 The court will address each as it sees fit.

4 **II. Legal Standards**

5 **A. Motion to Dismiss**

6 The court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief
7 can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and
8 plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).
9 Although Rule 8 does not require detailed factual allegations, it does require more than labels and
10 conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, a formulaic
11 recitation of the elements of a cause of action will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662,
12 677 (2009) (citation omitted). Rule 8 does not unlock the doors of discovery for a plaintiff armed
13 with nothing more than conclusions. *Id.* at 678–79.

14 To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state
15 a claim to relief that is plausible on its face." *Id.* A claim has facial plausibility when the plaintiff
16 pleads factual content that allows the court to draw the reasonable inference that the defendant is
17 liable for the misconduct alleged. *Id.* When a complaint pleads facts that are merely consistent
18 with a defendant's liability, and shows only a mere possibility of entitlement, the complaint does
19 not meet the requirements to show plausibility of entitlement to relief. *Id.*

20 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
21 when considering a motion to dismiss. *Id.* First, the court must accept as true all of the allegations
22 contained in a complaint. *Id.* However, this requirement is inapplicable to legal conclusions. *Id.*
23 Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*
24 at 678. Where the complaint does not permit the court to infer more than the mere possibility of
25 misconduct, the complaint has "alleged – but not shown – that the pleader is entitled to relief." *Id.*
26 at 679. When the allegations in a complaint have not crossed the line from conceivable to
27 plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

28

1 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
2 1216 (9th Cir. 2011). The *Starr* court held:

3 First, to be entitled to the presumption of truth, allegations in a complaint or
4 counterclaim may not simply recite the elements of a cause of action, but must
5 contain sufficient allegations of underlying facts to give fair notice and to enable
6 the opposing party to defend itself effectively. Second, the factual allegations that
7 are taken as true must plausibly suggest an entitlement to relief, such that it is not
8 unfair to require the opposing party to be subjected to the expense of discovery and
9 continued litigation.

10 *Id.*

11 **B. Motion for Summary Judgment**

12 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
13 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
14 show that “there is no genuine dispute as to any material fact and the movant is entitled to a
15 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is
16 “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317,
17 323–24 (1986).

18 For purposes of summary judgment, disputed factual issues should be construed in favor
19 of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be
20 entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts
21 showing that there is a genuine issue for trial.” *Id.*

22 In determining summary judgment, a court applies a burden-shifting analysis. The moving
23 party must first satisfy its initial burden. “When the party moving for summary judgment would
24 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
25 directed verdict if the evidence went uncontested at trial. In such a case, the moving party has
the initial burden of establishing the absence of a genuine issue of fact on each issue material to
its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)
(citations omitted).

26 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
27 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
28 element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed

1 to make a showing sufficient to establish an element essential to that party's case on which that
2 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
3 party fails to meet its initial burden, summary judgment must be denied and the court need not
4 consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
5 60 (1970).

6 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
7 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
8 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
9 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
10 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
11 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
12 631 (9th Cir. 1987).

13 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
14 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
15 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
16 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
17 for trial. *See Celotex*, 477 U.S. at 324.

18 At summary judgment, a court’s function is not to weigh the evidence and determine the
19 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*
20 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
21 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
22 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
23 granted. *See id.* at 249–50.

24 **III. Discussion**

25 As an initial matter, BANA’s claim for injunctive relief against Daisy Trust, claim (4), is
26 dismissed without prejudice because the court follows the well-settled rule that a claim for
27 “injunctive relief” standing alone is not a cause of action. *See, e.g., In re Wal-Mart Wage & Hour*
28 *Emp’t Practices Litig.*, 490 F. Supp. 2d 1091, 1130 (D. Nev. 2007); *Tillman v. Quality Loan Serv.*

1 *Corp.*, No. 2:12-cv-346-JCM-RJJ, 2012 WL 1279939, at *3 (D. Nev. Apr. 13, 2012) (finding that
2 “injunctive relief is a remedy, not an independent cause of action”); *Jensen v. Quality Loan Serv.*
3 *Corp.*, 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010) (“A request for injunctive relief by itself does
4 not state a cause of action.”).

5 **A. Judicial Notice**

6 The court takes judicial notice of the following recorded documents: first deed of trust
7 (ECF No. 35-1); notice of delinquent assessment (ECF No. 35-2); notice of default and election to
8 sell (ECF Nos. 35-3); notice of trustee’s sale (ECF No. 35-5); trustee’s deed upon sale (ECF No.
9 35-6); and declaration of covenants, conditions, and restrictions of Nevada Trails (ECF No. 35-8).
10 *See, e.g., United States v. Corinthian Colls.*, 655 F.3d 984, 998–99 (9th Cir. 2011) (holding that a
11 court may take judicial notice of public records if the facts noticed are not subject to reasonable
12 dispute); *Intri-Plex Tech., Inv. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

13 **B. The HOA’s Motion to Dismiss**

14 **I. Claim 1**

15 Claim (1) of BANA’s complaint alleges a claim to quiet title/for declaratory relief against
16 all defendants. (ECF No. 1 at 6–10). In the instant motion, the HOA argues that BANA’s quiet
17 title claim should be dismissed because it is time-barred by the statute of limitations. (ECF No.
18 34). The court disagrees.

19 Under Nevada law, “[a]n action may be brought by any person against another who claims
20 an estate or interest in real property, adverse to the person bringing the action for the purpose of
21 determining such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require
22 any particular elements, but each party must plead and prove his or her own claim to the property
23 in question and a plaintiff’s right to relief therefore depends on superiority of title.” *Chapman v.*
24 *Deutsche Bank Nat’l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (internal quotation marks and
25 citations omitted). Therefore, for plaintiff to succeed on its quiet title action, it needs to show that
26 its claim to the property is superior to all others. *See also Breliant v. Preferred Equities Corp.*,
27 918 P.2d 314, 318 (Nev. 1996) (“In a quiet title action, the burden of proof rests with the plaintiff
28 to prove good title in himself.”).

1 Under NRS 40.010, an “action may be brought by any person against another who claims
2 an estate or interest in real property, adverse to the person bringing the action, for the purpose of
3 determining such adverse claim.” Nev. Rev. Stat. § 40.010. Further, NRS 11.070 sets forth a five-
4 year limitations period for quiet title claims. *Weeping Hollow Ave. Trust v. Spencer*, 831 F.3d
5 1110, 1114 (9th Cir. 2016) (“Under Nevada law, Spencer could have brought claims challenging
6 the HOA foreclosure sale within five years of the sale.”); *Scott v. Mortg. Elec. Registration Sys., Inc.*,
7 605 F. App’x 598, 600 (9th Cir. 2015) (“The statute of limitations for quiet title claims in
8 Nevada is five years.”); *Bank of Am., N.A. v. Antelope Homeowners’ Ass’n*, No. 2:16-cv-00449-JCM-PAL,
9 2017 WL 421652, at *3 (D. Nev. Jan. 30, 2017); *Nationstar Mortg. LLC v. Amber Hills II Homeowners Ass’n*,
10 No. 2:15-cv-01433-APG-CWH, 2016 WL 1298108, at *3 (D. Nev. Mar. 31, 2016).

12 The foreclosure sale took place on September 5, 2012. (ECF No. 1). BANA filed the
13 underlying complaint on April 18, 2016. (ECF No. 1). Thus, BANA’s quiet title claim was timely
14 filed within the five-year limitations period set forth in NRS 11.070, and the HOA’s motion to
15 dismiss on this basis will be denied.

16 **2. *Claim 2***

17 Claim (2) of BANA’s complaint alleges that the HOA and A&K violated NRS 116.1113,
18 which imposes an obligation of good faith in every contract or duty governed by Chapter 116.
19 (ECF No. 1 at 10–11). For relief, BANA seeks damages in the amount of either the property’s fair
20 market value or the unpaid principal on the loan as of the date of the HOA sale. (ECF No. 1 at
21 12).

22 Because claim (2) is a claim for damages based on the alleged breach of a statutory duty,
23 it must be brought within three years. *See* Nev. Rev. Stat. § 11.190(3)(a). The foreclosure sale
24 took place on September 5, 2012. (ECF No. 1 at 2). BANA brought this lawsuit more than three
25 years later, on April 18, 2016. (ECF No. 1). Therefore, claim (2) is time-barred, and the HOA’s
26 motion to dismiss will be granted with prejudice as to this claim.

27 ...

28 ...

1 **3. Claim 3**

2 Claim (3) of BANA’s complaint alleges that the foreclosure sale was wrongful because the
3 HOA and A&K failed to give proper notice and an opportunity to cure the deficiency, and the
4 HOA sold the property for a grossly inadequate amount. (ECF No. 1 at 12–13). BANA seeks
5 damages in the amount of the property’s fair market value or the unpaid principal loan balance as
6 of the time of the foreclosure sale. (ECF No. 1 at 13).

7 A tortious wrongful foreclosure claim “challenges the authority behind the foreclosure, not
8 the foreclosure act itself.” *McKnight Family, L.L.P. v. Adept Mgmt.*, 310 P.3d 555 at 559 (2013).
9 A&K’s authority to foreclose on the HOA lien on behalf of the HOA arose from Chapter 116,
10 essentially rendering count three a claim for damages based on liability created by a statute.
11 Therefore, claim (3) is likewise time-barred under NRS 11.190(3)(a) because it was not brought
12 within three years.

13 **C. Quiet Title²**

14 In the instant motions, Daisy Trust and BANA both move for summary judgment regarding
15 their quiet title claims.

16 Daisy Trust argues that it is a *bona fide purchaser* and that the foreclosure sale was valid.
17 (ECF No. 32).

18 BANA raises the following five arguments: (1) its tender was sufficient and should not
19 have been rejected; (2) the HOA lien statute is facially unconstitutional, and “any [] factual issue[s]
20 concerning actual notice [are] irrelevant”; (3) the foreclosure sale was commercially unreasonable;
21 (4) Daisy Trust was not a *bona fide purchaser* for value; and (5) the *SFR Investments* decision
22 should not be applied retroactively. (ECF No. 35 at 12).

23 Under Nevada law, “[a]n action may be brought by any person against another who claims
24 an estate or interest in real property, adverse to the person bringing the action for the purpose of
25 determining such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require
26 any particular elements, but each party must plead and prove his or her own claim to the property

28 ² The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where
otherwise indicated, the references in this order to statutes codified in NRS Chapter 116 are to the
version of the statutes in effect in 2010–12, when the events giving rise to this litigation occurred.

1 in question and a plaintiff's right to relief therefore depends on superiority of title." *Chapman v.*
2 *Deutsche Bank Nat'l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (internal quotation marks and
3 citations omitted). Therefore, for plaintiff to succeed on its quiet title action, it needs to show that
4 its claim to the property is superior to all others. *See also Breliant v. Preferred Equities Corp.*,
5 918 P.2d 314, 318 (Nev. 1996) ("In a quiet title action, the burden of proof rests with the plaintiff
6 to prove good title in himself.").

7 Section 116.3116(1) of the NRS gives an HOA a lien on its homeowners' residences for
8 unpaid assessments and fines. Nev. Rev. Stat. § 116.3116(1). Moreover, NRS 116.3116(2) gives
9 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as
10 "[a] first security interest on the unit recorded before the date on which the assessment sought to
11 be enforced became delinquent." Nev. Rev. Stat. § 116.3116(2)(b).

12 The statute then carves out a partial exception to subparagraph (2)(b)'s exception for first
13 security interests. *See* Nev. Rev. Stat. § 116.3116(2). In *SFR Investment Pool I v. U.S. Bank*, the
14 Nevada Supreme Court provided the following explanation:

15 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,
16 a superpriority piece and a subpriority piece. The superpriority piece, consisting of
17 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement
charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all
other HOA fees or assessments, is subordinate to a first deed of trust.

18 334 P.3d 408, 411 (Nev. 2014) ("*SFR Investments*").

19 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority
20 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, "NRS 116.3116(2) provides an HOA a true
21 superpriority lien, proper foreclosure of which will extinguish a first deed of trust." *Id.* at 419; *see also* Nev. Rev. Stat. § 116.31162(1) (providing that "the association may foreclose its lien by sale"
22 upon compliance with the statutory notice and timing rules).

24 **I. Deed Recitals**

25 Section 116.3116(1) of the Nevada Revised Statutes gives an HOA a lien on its
26 homeowners' residences for unpaid assessments and fines; moreover, NRS 116.3116(2) gives
27 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as
28

1 “[a] first security interest on the unit recorded before the date on which the assessment sought to
2 be enforced became delinquent.” Nev. Rev. Stat. § 116.3116(2)(b).

3 The statute then carves out a partial exception to subparagraph (2)(b)’s exception for first
4 security interests. *See* Nev. Rev. Stat. § 116.3116(2). In *SFR Investment Pool I v. U.S. Bank*, the
5 Nevada Supreme Court provided the following explanation:

6 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,
7 a superpriority piece and a subpriority piece. The superpriority piece, consisting of
8 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement
9 charges, is “prior to” a first deed of trust. The subpriority piece, consisting of all
10 other HOA fees or assessments, is subordinate to a first deed of trust.

11 334 P.3d 408, 411 (Nev. 2014) (“*SFR Investments*”).

12 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority
13 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, “NRS 116.3116(2) provides an HOA a true
14 superpriority lien, proper foreclosure of which will extinguish a first deed of trust.” *Id.* at 419; *see also* Nev. Rev. Stat. § 116.31162(1) (providing that “the association may foreclose its lien by sale”
15 upon compliance with the statutory notice and timing rules).

16 Subsection (1) of NRS 116.31166 provides that the recitals in a deed made pursuant to
17 NRS 116.31164 of the following are conclusive proof of the matters recited:

- 18 (a) Default, the mailing of the notice of delinquent assessment, and the recording
19 of the notice of default and election to sell;
20 (b) The elapsing of the 90 days; and
21 (c) The giving of notice of sale[.]

22 Nev. Rev. Stat. § 116.31166(1)(a)–(c).³ “The ‘conclusive’ recitals concern default, notice, and
23 publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale
24 as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and

25 ³ The statute further provides as follows:

26 2. Such a deed containing those recitals is conclusive against the unit’s
27 former owner, his or her heirs and assigns, and all other persons. The receipt for the
28 purchase money contained in such a deed is sufficient to discharge the purchaser
 from obligation to see to the proper application of the purchase money.

29 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164
30 vests in the purchaser the title of the unit’s owner without equity or right of
 redemption.

31 Nev. Rev. Stat. § 116.31166(2)–(3).

1 give context to NRS 116.31166.” *Shadow Wood Homeowners Assoc. v. N.Y. Cnty. Bancorp., Inc.*,
2 366 P.3d 1105 (Nev. 2016) (“*Shadow Wood*”). Nevertheless, courts retain the equitable authority
3 to consider quiet title actions when a HOA’s foreclosure deed contains statutorily conclusive
4 recitals. *See id.* at 1112.

5 Here, the court has taken judicial notice of the recorded trustee’s deed upon sale, the
6 recorded notice of delinquent assessment, the recorded notice of default and election to sell, and
7 the recorded notice of trustee’s sale. Pursuant to NRS 116.31166, the recitals in the recorded
8 foreclosure deed are conclusive to the extent that they implicate compliance with NRS 116.31162
9 through NRS 116.31164, which provide the statutory prerequisites of a valid foreclosure. *See id.*
10 at 1112 (“[T]he recitals made conclusive by operation of NRS 116.31166 implicate compliance
11 only with the statutory prerequisites to foreclosure.”). Therefore, pursuant to NRS 116.31166 and
12 the recorded foreclosure deed, the foreclosure sale is valid to the extent that it complied with NRS
13 116.31162 through NRS 116.31164.

14 Importantly, while NRS 116.3116 accords certain deed recitals conclusive effect—*e.g.*,
15 default, notice, and publication of the notice of sale—it does not conclusively, as a matter of law,
16 entitle Daisy Trust to success on its quiet title claim. *See Shadow Wood*, 366 P.3d at 1112
17 (rejecting contention that NRS 116.31166 defeats, as a matter of law, actions to quiet title). Thus,
18 the question remains whether BANA has demonstrated sufficient grounds to justify setting aside
19 the foreclosure sale. *See id.* “When sitting in equity . . . courts must consider the entirety of the
20 circumstances that bear upon the equities. This includes considering the status and actions of all
21 parties involved, including whether an innocent party may be harmed by granting the desired
22 relief.” *Id.*

23 **2. Rejected Tender**

24 In the instant motion, BANA argues that its tender on April 30, 2010, to A&K preserved
25 the seniority of BANA’s deed of trust. (ECF No. 35 at 8–10). BANA asserts that it calculated the
26 superpriority amount to be \$387.00 and tendered that amount to A&K on April 30, 2010, which
27 A&K allegedly refused. (ECF No. 35-4 at 16–18).

28

1 The court disagrees. BANA did not tender the amount set forth in the ledger, which stated
2 an amount due of \$2,624.00. (ECF No. 35-4 at 11–14). Rather, BANA tendered a lesser amount,
3 specifically, \$387.00. (ECF No. 35-4 at 16–18).

4 Under NRS 116.31166(1), the holder of a first deed of trust may pay off the superpriority
5 portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest.
6 *See Nev. Rev. Stat. § 116.31166(1); see also SFR Investments*, 334 P.3d at 414 (“But as a junior
7 lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security . . .”); *see*
8 *also, e.g., 7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A. et al.*, 979 F. Supp. 2d 1142, 1149
9 (D. Nev. 2013) (“If junior lienholders want to avoid this result, they readily can preserve their
10 security interests by buying out the senior lienholder’s interest.” (citing *Carillo v. Valley Bank of*
11 *Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v. Nicholas Beers Co.*, 611 P.2d 1079, 1083 (Nev.
12 1980))).

13 The superpriority lien portion, however, consists of “the last nine months of unpaid HOA
14 dues **and maintenance and nuisance-abatement charges**,” while the subpriority piece consists of
15 “all other HOA fees or assessments.” *SFR Investments*, 334 P.3d at 411 (emphasis added); *see*
16 *also 7912 Limbwood Ct. Trust*, 979 F. Supp. 2d at 1150 (“The superpriority lien consists only of
17 unpaid assessments and certain charges specifically identified in § 116.31162.”). BANA tendered
18 \$387.00 based on its calculation of the nine months of unpaid HOA dues, without adequately
19 accounting for the maintenance and nuisance-abatement charges. (ECF No. 35-4 at 16–18).
20 Further, BANA fails to explain why it was appropriate to eliminate the other charges calculated in
21 the ledger’s superpriority total. (ECF No. 35 at 5–10).

22 BANA merely presumed, without adequate support, that the amount set forth in the ledger
23 included more than the superpriority lien portion and that a lesser amount based on BANA’s own
24 calculations would be sufficient to preserve its interest in the property. *See generally, e.g., Nev.*
25 *Rev. Stat. § 107.080* (allowing trustee’s sale under a deed of trust only when a subordinate interest
26 has failed to make good the deficiency in performance or payment for 35 days); *Nev. Rev. Stat. §*
27 *40.430* (barring judicially ordered foreclosure sale if the deficiency is made good at least 5 days
28 prior to sale).

1 In response to BANA’s January 15, 2010, letter, A&K provided a statement indicating an
2 amount due of \$2,624.00. (ECF No. 35-4 at 11–14). Rather than tendering the \$2,624.00 due so
3 as to preserve its interest in the property and then later seeking a refund of any difference, BANA
4 elected to pay a lesser amount (\$387.00) based on its unwarranted assumption that the amount
5 stated in the notice included more than what was due. *See SFR Investments*, 334 P.3d at 418
6 (noting that the deed of trust holder can pay the entire lien amount and then sue for a refund). Had
7 BANA paid the amount set forth in the ledger (\$2,624.00), the HOA’s interest would have been
8 subordinate to the first deed of trust. *See Nev. Rev. Stat. § 116.31166(1)*.

9 After failing to use the legal remedies available to BANA to prevent the property from
10 being sold to a third party—for example, seeking a temporary restraining order and preliminary
11 injunction and filing a *lis pendens* on the property (*see Nev. Rev. Stat. §§ 14.010, 40.060*)—
12 BANA now seeks to profit from its own failure to follow the rules set forth in the statutes. *See*
13 *generally, e.g., Barkley’s Appeal. Bentley’s Estate*, 2 Monag. 274, 277 (Pa. 1888) (“In the case
14 before us, we can see no way of giving the petitioner the equitable relief she asks without doing
15 great injustice to other innocent parties who would not have been in a position to be injured by
16 such a decree as she asks if she had applied for relief at an earlier day.”); *Nussbaumer v. Superior*
17 *Court in & for Yuma Cty.*, 489 P.2d 843, 846 (Ariz. 1971) (“Where the complaining party has
18 access to all the facts surrounding the questioned transaction and merely makes a mistake as to the
19 legal consequences of his act, equity should normally not interfere, especially where the rights of
20 third parties might be prejudiced thereby.”).

21 Based on the foregoing, BANA has failed to establish that it tendered a sufficient amount
22 prior to the foreclosure sale so as to render Daisy Trust’s title subject to BANA’s deed of trust.

23 **3. Due Process**

24 BANA argues that the HOA lien statute is facially unconstitutional because it does not
25 mandate notice to deed of trust beneficiaries. (ECF No. 35 at 11–16). BANA further contends
26 that any factual issues concerning actual notice is irrelevant pursuant to *Bourne Valley Court Trust*
27 *v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016) (“Bourne Valley”). (ECF No. 35 at 11–
28 16).

1 The Ninth Circuit held that NRS 116.3116’s “opt-in” notice scheme, which required a
2 HOA to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively
3 requested notice, facially violated mortgage lenders’ constitutional due process rights. *Bourne*
4 *Valley*, 832 F.3d at 1157–58. The facially unconstitutional provision, as identified in *Bourne*
5 *Valley*, exists in NRS 116.31163(2). *See id.* at 1158. At issue is the “opt-in” provision that
6 unconstitutionally shifts the notice burden to holders of the property interest at risk. *See id.*

7 To state a procedural due process claim, a claimant must allege “(1) a deprivation of a
8 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural
9 protections.” *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.
10 1998). BANA has satisfied the first element as a deed of trust is a property interest under Nevada
11 law. *See Nev. Rev. Stat. § 107.020 et seq.; see also Mennonite Bd. of Missions v. Adams*, 462 U.S.
12 791, 798 (1983) (stating that “a mortgagee possesses a substantial property interest that is
13 significantly affected by a tax sale”). However, BANA fails on the second prong.

14 Due process does not require actual notice. *Jones v. Flowers*, 547 U.S. 220, 226 (2006).
15 Rather, it requires notice “reasonably calculated, under all the circumstances, to apprise interested
16 parties of the pendency of the action and afford them an opportunity to present their objections.”
17 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Bourne Valley*,
18 832 F.3d at 1158.

19 Here, adequate notice was given to the interested parties prior to extinguishing a property
20 right. In fact, BANA acknowledges having received the notice of default. (ECF No. 35-4 at 6–7)
21 (“This letter is written in response to your Notice of Default with regard to the HOA assessments
22 purportedly owed on the above described real property.”). As a result, the notice of trustee’s sale
23 was sufficient notice to cure any constitutional defect inherent in NRS 116.31163(2) because it put
24 BANA on notice that its interest was subject to pendency of action and offered all of the required
25 information. *See also Spears v. Spears*, 596 P.2d 210, 212 (Nev. 1979) (“The rule is well
26 established that one who is not prejudiced by the operation of a statute cannot question its
27 validity.”). Further, BANA does not dispute receiving actual notice of the foreclosure sale, but
28 merely that “actual notice does not change the analysis.” (ECF No. 35 at 12–13).

1 **4. Commercial Reasonability**

2 BANA contends that the sale was commercially unreasonable so judgment in favor of
3 Daisy Trust is inappropriate because the sale of the property for 3% of its fair market value is
4 grossly inadequate as a matter of law. (ECF No. 35 at 17). BANA further argues that the *Shadow*
5 *Wood* court adopted the restatement approach, quoting the opinion as holding that “[w]hile gross
6 inadequacy cannot be precisely defined in terms of a specific percentage of fair market value,
7 generally a court is warranted in invalidating a sale where the price is less than 20 percent of fair
8 market value.” (ECF No. 35 at 18) (emphasis and alterations omitted).

9 NRS 116.3116 codifies the Uniform Common Interest Ownership Act (“UCIOA”) in
10 Nevada. *See* Nev. Rev. Stat. § 116.001 (“This chapter may be cited as the Uniform Common-
11 Interest Ownership Act”); *see also SFR Investments*, 334 P.3d at 410. Numerous courts have
12 interpreted the UCIOA and NRS 116.3116 as imposing a commercial reasonableness standard on
13 foreclosure of association liens.⁴

14 In *Shadow Wood*, the Nevada Supreme Court held that an HOA’s foreclosure sale may be
15 set aside under a court’s equitable powers notwithstanding any recitals on the foreclosure deed
16 where there is a “grossly inadequate” sales price and “fraud, unfairness, or oppression.” 366 P.3d
17 at 1110; *see also Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 184 F. Supp. 3d 853, 857–58
18 (D. Nev. 2016). In other words, “demonstrating that an association sold a property at its
19 foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a
20 showing of fraud, unfairness, or oppression.” *Id.* at 1112; *see also Long v. Towne*, 639 P.2d 528,
21 530 (Nev. 1982) (“Mere inadequacy of price is not sufficient to justify setting aside a foreclosure

22 ⁴ *See, e.g., Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1229
23 (D. Nev. 2013) (“[T]he sale for \$10,000 of a Property that was worth \$176,000 in 2004, and which
24 was probably worth somewhat more than half as much when sold at the foreclosure sale, raises
serious doubts as to commercial reasonableness.”); *SFR Investments*, 334 P.3d at 418 n.6 (noting
bank’s argument that purchase at association foreclosure sale was not commercially reasonable);
Thunder Props., Inc. v. Wood, No. 3:14-cv-00068-RCJ-WGC, 2014 WL 6608836, at *2 (D. Nev.
Nov. 19, 2014) (concluding that purchase price of “less than 2% of the amounts of the deed of
trust” established commercial unreasonableness “almost conclusively”); *Rainbow Bend*
Homeowners Ass’n v. Wilder, No. 3:13-cv-00007-RCJ-VPC, 2014 WL 132439, at *2 (D. Nev.
Jan. 10, 2014) (deciding case on other grounds but noting that “the purchase of a residential
property free and clear of all encumbrances for the price of delinquent HOA dues would raise
grave doubts as to the commercial reasonableness of the sale under Nevada law”); *Will v. Mill*
Condo. Owners’ Ass’n, 848 A.2d 336, 340 (Vt. 2004) (discussing commercial reasonableness
standard and concluding that “the UCIOA does provide for this additional layer of protection”).

1 sale, absent a showing of fraud, unfairness or oppression.” (citing *Golden v. Tomiyasu*, 387 P.2d
2 989, 995 (Nev. 1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere
3 inadequacy of price, it may be if the price is grossly inadequate and there is “in addition proof of
4 some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy
5 of price” (internal quotation omitted))).

6 Despite BANA’s assertion to the contrary, the *Shadow Wood* court did not adopt the
7 restatement. In fact, nothing in *Shadow Wood* suggests that the Nevada Supreme Court adopted,
8 or had the intention to adopt, the restatement. *Compare Shadow Wood*, 366 P.3d at 1112–13 (citing
9 the restatement as secondary authority to warrant use of the 20% threshold test for grossly
10 inadequate sales price), *with St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 213 (Nev. 2009)
11 (explicitly adopting § 4.8 of the Restatement in specific circumstances); *Foster v. Costco*
12 *Wholesale Corp.*, 291 P.3d 150, 153 (Nev. 2012) (“[W]e adopt the rule set forth in the Restatement
13 (Third) of Torts: Physical and Emotional Harm section 51.”); *Cucinotta v. Deloitte & Touche,*
14 *LLP*, 302 P.3d 1099, 1102 (Nev. 2013) (affirmatively adopting the Restatement (Second) of Torts
15 section 592A). Because Nevada courts have not adopted the relevant section(s) of the restatement
16 at issue here, the *Long* test, which requires a showing of fraud, unfairness, or oppression in addition
17 to a grossly inadequate sale price to set aside a foreclosure sale, controls. *See* 639 P.2d at 530.

18 Nevada has not clearly defined what constitutes “unfairness” in determining commercial
19 reasonableness. The few Nevada cases that have discussed commercial reasonableness state,
20 “every aspect of the disposition, including the method, manner, time, place, and terms, must be
21 commercially reasonable.” *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 920 (Nev. 1977).
22 This includes “quality of the publicity, the price obtained at the auction, [and] the number of
23 bidders in attendance.” *Dennison v. Allen Grp. Leasing Corp.*, 871 P.2d 288, 291 (Nev. 1994)
24 (citing *Savage Constr. v. Challenge-Cook*, 714 P.2d 573, 574 (Nev. 1986)).

25 Nevertheless, BANA fails to set forth sufficient evidence to show fraud, unfairness, or
26 oppression so as to justify the setting aside of the foreclosure sale. BANA relies on its repeated
27 assertion that it tendered the superpriority amount to show fraud, unfairness, or oppression.
28 However, as discussed previously, the amount due on the date of BANA’s tender was set forth in

1 the ledger, specifically, \$2,624.00. Rather than tendering the noticed amount under protest so as
2 to preserve its interest and then later seeking a refund of the difference in dispute, BANA chose to
3 tender a lesser amount (\$387.00), an amount it calculated to be the superpriority portion. (ECF
4 No. 35-4 at 16–18).

5 Accordingly, BANA’s commercial reasonability argument fails as a matter of law as it
6 failed to set forth evidence of fraud, unfairness, or oppression. *See, e.g., Nationstar Mortg., LLC*
7 *v. SFR Investments Pool 1, LLC*, No. 70653, 2017 WL 1423938, at *2 n.2 (Nev. App. Apr. 17,
8 2017) (“Sale price alone, however, is never enough to demonstrate that the sale was commercially
9 unreasonable; rather, the party challenging the sale must also make a showing of fraud, unfairness,
10 or oppression that brought about the low sale price.”).

11 **5. *Bona Fide Purchaser Status***

12 Because the court has concluded that BANA failed to properly raise any equitable
13 challenges to the foreclosure sale, the court need not address BANA’s argument that Daisy Trust
14 was not a *bona fide* purchaser for value. *Nationstar Mortg., LLC*, No. 70653, 2017 WL 1423938,
15 at *3 n.3 (citing *Shadow Wood*, 366 P.3d at 1114).

16 **6. *Retroactive Application***

17 BANA contends that *SFR Investments* should not be applied retroactively to extinguish the
18 first deed of trust. (ECF No. 35 at 24–25).

19 The Nevada Supreme Court has since applied the *SFR Investments* holding in numerous
20 cases that challenged pre-*SFR Investments* foreclosure sales. *See, e.g., Centeno v. Mortg. Elec.*
21 *Registration Sys., Inc.*, No. 64998, 2016 WL 3486378, at *2 (Nev. June 23, 2016); *LN Mgmt. LLC*
22 *Series 8301 Boseck 228 v. Wells Fargo Bank, N.A.*, No. 64495, 2016 WL 1109295, at *1 (Nev.
23 Mar. 18, 2016) (reversing 2013 dismissal of quiet-title action that concluded contrary to *SFR*
24 *Investments*, reasoning that “the district court’s decision was based on an erroneous interpretation
25 of the controlling law”); *Mackensie Family, LLC v. Wells Fargo Bank, N.A.*, No. 65696, 2016 WL
26 315326, at *1 (Nev. Jan. 22, 2016) (reversing and remanding because “[t]he district court’s
27 conclusion of law contradicts our holding in *SFR Investments Pool 1 v. U.S. Bank*”). Thus, *SFR*
28 *Investments* applies to this case.

For the foregoing reasons, BANA has failed to show that it is entitled to judgment as a matter of law regarding its claim to quiet title. However, Daisy Trust is entitled to judgment in its favor.

IV. Conclusion

In sum, BANA's breach of NRS 116.1113 and wrongful foreclosure claims (claims 2 and 3) will be dismissed with prejudice as they are time-barred by the statute of limitations. BANA's injunctive relief claim (claim 4) will be dismissed without prejudice. And, BANA's motion for summary judgment on its quiet title claim against all parties (claim 1) will be denied because BANA failed to show that it is entitled to judgment as a matter of law. On the other hand, Daisy Trust has shown that it is entitled to judgment as a matter of law as BANA cannot show that BANA's interest in the property is superior to that of Daisy Trust's interest. Daisy Trust has provided the recorded foreclosure deed in its favor, which is conclusive of the recitals contained therein, and has shown that its interest in the property is superior to that of BANA's interest. Therefore, the court will grant Daisy Trust's motion for summary judgment.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Daisy Trust's motion for summary judgment (ECF No. 32) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the HOA's motion to dismiss or in the alternative motion for summary judgment (ECF No. 34) be, and the same hereby is, GRANTED IN PART and DENIED IN PART consistent with the foregoing.

IT IS FURTHER ORDERED that BANA's motion for summary judgment (ECF No. 35) be, and the same hereby is, DENIED.

The clerk is instructed to enter judgment accordingly and close the case.

DATED July 11, 2017.

Xenia C. Mahan
UNITED STATES DISTRICT JUDGE